No. 433

DEC 30 1916
JAMES D. MAHER
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Supreme Court of the United States

THE JOHN CHURCH CO.,

Petitioner,

against

HILLIARD HOTEL COMPANY and HENRI DE MARTINI,

Respondents.

BRIEF FOR RESPONDENTS

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To the petitioner's general statement of facts we wish to add only that not only was no charge made for admission to the dining-room or for the privilege of hearing the musical performance, but also no additional charge was made for meals furnished at the time when such music was performed over the charge made when there was no music (fol. 24).

POINT I.

The march "From Maine to Oregon" is a musical composition as distinguished from a dramatico-musical composition, the copyright of which is infringed only by public performance for profit.

The best evidence of the correctness of this contention is the music itself, between pages 4 and 5 of the record, an examination of which reveals that the march which was performed by the defendants

is indeed a musical composition, pure and simple, with no words or dramatic action.

Bowker, at page 177, has defined dramatico-musical compositions as "music and drama in association." And, indeed, without such association the name is a misnomer.

To the same effect:

Daly v. *Palmer*, 6 Blatchford, 256.
Fuller v. *Bemis*, 50 Fed., 926.
Barnes v. *Miner*, 122 Fed., 480.

When the petitioner's assignor copyrighted the march as a musical composition, he correctly followed Rule 9 of the United States Copyright Office, which reads as follows:

> "*Dramatico-musical compositions* include principally operas, operettas and musical comedies or similar productions which are to be acted as well as sung.
>
> Ordinary songs, even when intended to be sung from the stage in a dramatic manner, or separately published songs from operas and operettas, should be registered as musical compositions, not dramatico-musical compositions."

Rule 10 provides that musical compositions, including other vocal and all instrumental compositions, with or without words, should be copyrighted as musical compositions. In paragraph Seventh of their complaint (fol. 4) petitioner's attorneys reveal their appreciation of this fact by alleging that defendants, in violation of petitioner's right, "publicly performed for profit the said musical composition 'From Maine to Oregon' by an orchestra, pursuant to the orchestration as contained in Exhibit A."

Why the allegation of a public performance "*for profit*" and the elaborate argument in their Point II, if their Point III is urged seriously?

Between the attorneys for the parties to this action it has never been contended, on the one hand, that this was anything other than a public performance, nor, on the other hand, that what was performed was other than a musical composition, as distinguished from a dramatico-musical composition. The whole issue between us has been whether the performance was one *for profit* within the purview of the Copyright Act.

The learned counsel for Victor Herbert, in the case of *Herbert* v. *Shanley,* who has sought the privilege of presenting that case in conjunction with this one, intervened in this case in the Circuit Court of Appeals and urged the point, which our opponents have now for the first time urged upon this appeal, that because the march "From Maine to Oregon" was originally a part of a dramatico-musical composition, it retains its character as such notwithstanding its removal from its dramatic environment and its separate arrangement for orchestral performance only, without any dramatic element whatever left in it, and its publication, copyright and sale as a musical composition.

He argued with great earnestness that by the separate publication of a part of a dramatico-musical composition he loses none of his dramatic rights to exclusive public performance. We agree with his law, but it does not fit our facts. If this composition had any dramatic element left in it, we concede we could not perform it publicly without the consent of the copyright owner; but when he takes it out of his dramatico-musical composition, eliminates all its dramatic element, and copy-

rights, publishes and sells it as a musical composition, he gives it into the public domain as such, and as such it may be publicly performed without his consent if such performance is not for profit.

In the companion case at bar, Judge HAND disposes of this contention in the following language:

> "However, the authors took out a copyright upon the song separately as a musical composition, and in so doing they necessarily gave into the public domain all musical rights except as they were covered by the resulting copyright. Whatever be the minimum of musical rights, it includes the right to perform the music publicly without any unnecessary accessories. Singing the words to the music, accompanied by the orchestra, is therefore within the musical rights so dedicated. On the other hand we now have it on the authority of Church Co. against Hilliard, *supra*, that a public performance of this kind is not within the statutory copyright which the plaintiffs received as consideration for their dedication. It seems necessarily to follow that the performance did not infringe.
>
> This result no doubt involves the abandonment of some rights, secured by the dramatico-musical copyright, but that is because the plaintiffs wished a double protection. There can be no justice in preserving their dramatic rights at the expense of the public's rights arising from taking out a musical copyright. Had they wished to retain a complete dramatic monopoly, they had it in their power to do so. As it is, that monopoly remains to their complete protection except so far as its limitation is necessary to give full scope to the musical copyright. For instance, if the performance here had been anything beyond the least essentials to a musical reproduction of a copyrighted song, it would be protected, but it was not. The plaintiffs are really try-

> ing to eat their cake and have it; they would get the full benefit of a musical copyright, while they prevent the public from enjoying the corresponding rights."
>
> 222 Fed Rep., 344.

We do not claim that the appellants have lost their dramatic performing rights by separately copyrighting "From Maine to Oregon" as a musical composition, but their musical performing rights, we claim, are regulated by Subdivision E and not Subdivision D of Section 1 of the Copyright Law.

POINT II.

The performance complained of was not a performance for profit within the purview of the Copyright Act.

We take no issue with petitioner's argument that the Copyright Act should be liberally construed, but we disagree with his contention that the act limits any common law right of exclusive public performance of musical composition, against which limitation the statute should be strictly construed.

We believe the Copyright Act gives to composers of musical compositions the only rights to exclusive public performance which they ever possessed; and it has coupled that right with the condition that it attaches only to public performance *for profit*.

This Court has said that "there never existed any common law right of copyright in the United States"; that such right is purely statutory.

> *White-Smith Music Pub. Co.* v. *Apollo*, 209 U. S., 1.

On page 7 of his brief our opponent has quoted from the case just cited a casual reference to the

fact that the Copyright Act gives certain performing rights to musical compositions which they did not before possess. It was not necessary for the Court to determine in that case the distinction between dramatic copyright under paragraph "D" and musical copyright under paragraph "E" of Section 1.

The fact that the copyright laws of most countries, other than the United States, referred to on page 5 of our opponent's brief, give to the composer of a musical composition the exclusive right to publicly perform serves to emphasize the distinction which our own Copyright Act makes between dramatico-musical compositions to which it gives the exclusive public performing rights, and musical compositions to which it gives exclusive public performing rights only for profit. We believe that the Copyright Law of England and of most European countries differs from our own act in the same respect that it does in the countries to which our opponent has referred.

This case, therefore, as was stated by the Circuit Court of Appeals, turns upon the meaning of the words "*for profit*."

With the definitions of "profit" as an antonym of loss, which our opponent has gleaned from the books, we have no quarrel, but we cannot see their application to this case. Whether we make a profit or sustain a loss from the operation of our hotel business, even taking into account that the cost to us of providing free music is a part of the operating expenses, does not determine whether the music was performed for profit within the purview of the Copyright Act.

We contend that the words "*for profit*," in paragraph "E," mean *for pay;* that is, a performance to hear which a fee is charged.

We contend that it is not the purpose for which free performance is given, but the fact whether or not it is free, which determines whether the performance is "for profit" within the purview of the act.

The petitioner argues that if our contention is sustained it will be possible for us to evade the statute by making an additional charge for meals where music is played, or in some other indirect way to charge for the musical performance. If this should be done in any of the ways suggested by counsel for the publishers, it could easily be proved. If we should charge an admission fee to the room where music is played, by a ticket which would entitle the holder to a cup of tea or other light refreshment, the music might well be considered the main thing and the refreshment a mere incident to the performance. If we should charge more for meals in places where or at times when music is played, this would as easily be proved, and the Court doubtless would hold that we charged for music, and the amount of our charge for the music would be as readily determined as it would in the case of a straight admission fee.

In view of the fact that in the case at bar we made no such extra charge, we can justly say that neither directly nor indirectly have we charged for the music nor derived any profit or income from it. While our purpose in playing was to amuse our guests and attract others, whether the music did in fact accomplish this purpose is purely conjectural; the march "From Maine to Oregon" may have driven more patrons from our dining room than it attracted thereto.

It is true that the charge to the guest must cover the cost of his food and everything necessarily and reasonably incidental to its preparation and serv-

ice, but music is not a necessary incident to the service of food, and the guest who pays for a meal cannot insist on music while he eats. Every hotel is under legal obligation to furnish food and necessary personal service to its guests, but no hotel is under any express or implied obligation to furnish music. The time and place of performance, and whether any performance at all is given, rest in the discretion of the hotel. Music is furnished only at certain times, and meals are furnished at all hours, with no difference in charge therefor when music is furnished.

On page 14 of his brief the petitioner has quoted from a House Committee report as throwing light on the legislative intent in the use of the words "for profit," but a more direct and helpful light is thrown on this by the act itself. The words "for profit" are expressly defined in Section 1 of the act, with reference to coin-operated machines, as follows:

> "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

It seems reasonable to assume that where the same expression is used twice in the same section of the act the legislative intent is the same in each case unless the contrary clearly appears.

The *Sarpy* case, referred to on pages 10 *et seq.* of petitioner's brief, was followed by Mr. Justice LACOMBE in granting the order which was vacated by the Circuit Court of Appeals. That case was decided under Section 1 of the English Copyright Act of 1882, which is as follows:

> "On and after the passing of this act the proprietor of a copyright in any musical composition first published after the passing of this act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved."

The *Sarpy* case is readily distinguishable from the case at bar. In the first place, the English statute under which the *Sarpy* case was decided confers much greater rights upon the composer than the American. In England the owner of a copyrighted musical composition may, by printing notice thereof on each published copy, reserve to himself all rights of public performance or representation. The all-important words "for profit" do not appear in the English act, nor is any equivalent expression used. Hence, any public performance, regardless of whether it is for profit or not, is an infringement. In the United States, however, it is not enough that the performance is public; it must also be for profit.

Secondly, the defendants in the *Sarpy* case claimed to be acting under the permission contained in the notice of reservation which allowed the performance of the music at "gratuitous public entertainments" and "entertainments which are absolutely free." The Court held the defendants to a strict compliance with the terms of this license. But the language of the license differs materially from that of the American Copyright Act. An artist may perform a work "publicly for profit" at a

gratuitous public entertainment; and likewise, he may perform gratuitously at a "public" entertainment "for profit." In the first case the performance would constitute, under our law, an infringement by the artist, while under the conditions in the *Sarpy* case it would not; and the givers of the entertainment would be protected both under the *Sarpy* case and under our law. In the second instance they would be guilty of an infringement both under our law and under the *Sarpy* case.

With all due respect to the learned Judges who decided the *Sarpy* case, it is submitted that their reasoning in support of the judgment in that case is not convincing. They assign as the grounds of their decision that the performance was not a "gratuitous public entertainment": (1) The fact that the performance was paid for by the proprietor of the hotel "with a view of gain"; (2) It was part of the means by which he attracted customers; (3) The public could not go there "without buying some of the commodities which Holland was there to sell"; (4) The "music was really part of the operations of the hotel"; (5) "The license cannot justify what was done."

The last reason is inapplicable to the case at bar because the language of the license differs from that of our Copyright Act materially.

The first reason seems altogether inadequate. Does the fact that the proprietor of a hotel paid for the performance of the music, assuming, as the Court does, that he did it "with a view of gain," make any difference in the character of the performance in so far as its being gratuitous is concerned? If the public without restriction had been admitted to the saloon free of charge and without the necessity of buying anything there, could it be said that the performance was nevertheless not a

"gratuitous public entertainment" merely because the proprietor of the hotel had to pay for it?

As to the second ground, it is pure speculation, to say the least, to contend that a customer buys a meal because music is performed in the dining room. It is much more reasonable to assume that he does so because he is hungry.

The third ground may perhaps be a suitable test for a "gratuitous public entertainment," but it is not a proper test of whether the defendants are performing complainant's music "publicly for profit." These words in our act can only contemplate a profit derived from the performance of the copyrighted music, not a profit derived from the sale of meals in the dining room where music is played. When one cannot enter a place where music is being performed without buying something, the entertainment cannot be said to be "gratuitous" or "absolutely free"; and yet the *music* as such is not being performed "for profit" if no admission is charged. There is no profit derived from the performance of the music; the profit, if any, is derived from the sale of the meal.

By reason, therefore, of the difference in the statutes of this country and of England, as well as the circumstances under which the *Sarpy* case was decided, and the insufficiency of the reasoning of the Court in that case, it is respectfully submitted that the decision in that case should not govern the decision on this appeal.

Immediately following his reference to the *Sarpy* case the petitioner (p. 12 of his brief) cites *Weisblatt* v. *Bingham* (58 Misc. [N. Y.], 328) to the effect that a rule similar to that in the *Sarpy* case was adopted by the New York Supreme Court.

This is misleading; the rule in the *Weisblatt* case is not the law of the State of New York.

The question in the *Weisblatt* case was whether the exhibition referred to was a common show and therefore required a license.

The *Weisblatt* case was decided in 1908. In January, 1912, the Court of Special Sessions of New York County reached exactly the opposite conclusion in the case of *People* v. *Martin* (137 N. Y. Supp., 377), where it was held that a carbaret show in a restaurant was not a public performance for profit and hence required no license.

Again, in the case of *People* v. *Wacke*, 77 Misc., 196, the Court on a state of facts exactly like the *Weisblatt* case refused to follow that decision, saying, at page 200:

> "The defendant was not engaged in the moving picture business. He was conducting a hotel and was engaged in the hotel and liquor business. He was exhibiting the pictures for the entertainment of his guests as an incident to his hotel business at the seashore."

Both the *Martin* and the *Wacke* case follow *People* v. *Royal*, 23 App. Div., 258, which held that a person who hired a room where he illustrated the tricks and devices of gamblers, for the purpose of selling a book, to which exhibition no admission fee was charged, is not engaged in conducting an exhibition. The Court said the *sale of the book*, not the exhibition, was the *principal thing*. So the sale of meals and not the performance of music is the source of profit, if any, to the hotel.

POINT III.

The enumeration in Section 28 of the Copyright Act of certain special cases where music may be publicly performed without the consent of the owner of the copyright is not exclusive.

Section 28 and Subdivision E of Section 1 of the act must be read together.

There is nothing in the language of Section 28 to indicate that it is intended to cover all of the occasions when music may be publicly performed without the consent of the owner of the copyright. The Court may take judicial notice of the fact that the Copyright Act has been built up from time to time without any recent attempt at scientific arrangement of its provisions.

In Bowker on "Copyright, Its History and Its Law," at pages 165 and 166, the learned author says:

> "It should be noted that the omission from sub-section D as to drama, and the inclusion in sub-section E as to music, of the words 'for profit'—doubtless with the intent of assuring to the individual purchaser of music the right to perform it privately—have significance here, and serve to give the dramatic author absolute control even over gratuitous performances and to limit the control of the musical author to performances which are not gratuitous, a negative provision covering and giving much wider latitude than the proviso above cited (Section 28)."

As the Circuit Court of Appeals said in this case:

> "This proviso must contemplate the charge of an admission fee, because, if the perform-

> ance is really 'not for profit,' it would be perfectly lawful, both under section 1 (e) and under the prior provision of section 28 itself. We must attribute a more plausible intention to Congress. We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose."
>
> *Church Co.* v. *Hilliard*, 221 Fed. Rep., 229.

The intent of the entire act is to be gleaned from the language of the act itself, in its present form, rather than from a report of a committee of Congress in connection with a particular amendment to the act. If the petitioner is right in his contention that all performances not expressly permitted by Section 28 are prohibited by the Copyright Law, then Subdivision E of Section 1 of the act is meaningless.

POINT IV.

Congress did not intend the far-reaching consequences of a decision sustaining appellant's contention.

If the petitioner is sustained in his contention that every performance of music is for profit, which is given in the hope of attracting trade or business, then not only hotels, but many other business establishments, from Maine to Oregon, will have to act as did most of the hotels in New York City while the original injunction order herein was in force, and dispense with the performance of copyrighted music owned by persons so short-sighted as

not to appreciate the benefits flowing to them from increased sales of music so brought to public notice.

If every free performance of music for the purpose of advertising or attracting business is "for profit" within the purview of the act, and no copyrighted music may be played for such purpose in any place to which the public has free access, without obtaining a special license from the owner, then a music store may not play copyrighted music for the purpose of selling an instrument or even the music itself. The public is invited to enter the store quite as much as it is to enter a hotel or a theatre.

A lone bugler walking down Pennsylvania Avenue playing "From Maine to Oregon" with an advertising placard on his back would infringe the right of public performance for profit as would his employer who thus advertised his business, although a performance of the same march on any mechanical instrument contained in a vehicle bearing the same advertising placard and following the same bugler down the avenue, would not infringe.

As was said by the Circuit Court of Appeals in this case:

> "If the complainant's construction of it (the Act) is right, then a church in which a copyrighted anthem is played is liable, together with the organist and every member of the choir, not only to injunction, but in damages in the sum of $10 for each performance, and the individuals perhaps to fine and imprisonment in addition."
>
> *Church Co. v. Hilliard, supra.*

Copyrighted music furnished in connection with a political parade organized to attract voters for a

candidate for a political office of honor and profit would infringe. Surely Congress never intended this.

The necessity of procuring a license for a public performance of music for pay will not prevent nor discourage such enterprises. It is easy for persons giving such concerts to determine from their receipts whether or not they are profitable. It is obvious, however, that the expense and inconvenience of procuring a license for free performances of music, the financial benefit of which is at best entirely conjectural, will greatly discourage and curtail such performances, which means decreased sales of musical publications and loss of employment by a large number of musicians.

It would seem, therefore, that Congress intended the words "for profit" in Subdivision E to mean a public performance for pay, where the profit, if any, is derived from the music itself and not from some other business to which the music is a mere incident.

It is, of course, no argument against petitioner's contention that it is novel. But there is some significance in the fact that although Subdivision E was enacted in 1897, this is the first case in the United States in which such a claim has been advanced. In the intervening seventeen years there have undoubtedly been countless performances of copyrighted music, both appellant's and others, under circumstances similar to the case at bar. Apparently there has been a general acquiescence among both the composers and publishers of music in the interpretation of the statute advanced by us. It is respectfully submitted that no valid reason has been urged for unsettling this condition of affairs and applying the act to situations not intended to be covered by it.

POINT V.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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